No. 10-441

IN THE

Supreme Court of the United States

JANICE R.,

Petitioner,

v.

DEBRA H.,

Respondent,

- and -

ANTHONY PARISI III
Attorney for the Child M.R.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF OF RESPONDENT ATTORNEY FOR THE CHILD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the New York Court of Appeals' decision, in a family law dispute between New York residents, to apply New York's law of comity and accord respect to Vermont law as to parentage, where the parties voluntarily entered into a Vermont civil union, presents a federal constitutional question for this Court's review.

2. Whether the New York Court of Appeals' determination that the child born to a same-sex couple in a Vermont civil union is the child of both partners as a matter of Vermont law and New York comity principles violates Petitioner's constitutional rights.

LIST OF PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the parties here and in the New York Court of Appeals are listed.

Janice R. is Petitioner here and was Appellee below ("Janice" or "Petitioner"). Debra H. is Respondent here and was Appellant below ("Debra"). Although not identified in Petitioner's list of parties provided pursuant to Rule 14.1(b), the couple's minor child, M.R., was represented below by appointed counsel, Anthony Parisi III ("Attorney for the Child"). Mr. Parisi, on behalf of M.R., was Appellant below and is Respondent here, pursuant to Rule 12.6.

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INTRODUCTION

Petitioner seeks review of the New York Court of Appeals' unanimous decision to apply New York comity principles to recognize Respondent Debra as a parent to the child, M.R. All seven judges concurred that Debra is a parent under Vermont law as a result of the Vermont civil union that Petitioner and Debra voluntarily entered into when Petitioner was pregnant with M.R. All seven judges further concluded that, through comity, New York recognizes the Vermont civil union to establish M.R.'s parentage. New York's high court therefore directed the trial court to conduct a hearing to determine whether granting Debra custody and/or visitation would serve M.R.'s best interests. The case remains pending before the trial court awaiting the result of a forensic evaluation; the best-interest hearing has yet to occur and Debra's petitions for visitation and custody have yet to be resolved. Interim visitation has been in place throughout the litigation and Debra is providing financial support as well.

The Petition should be denied. Contrary to Janice's assertion, the New York Court of Appeals' decision protects M.R. and respects his constitutional rights to continue his relationship with his second parent. While Janice purports to represent M.R.'s interests here and ignores entirely the existence of M.R.'s independent counsel, the Attorney for the Child was appointed for that purpose. He has argued throughout the appellate proceedings for an outcome that would result in a hearing that would respect M.R.'s right to continue

his parental relationships. The Court of Appeals' decision, made entirely on state-law grounds, will result in such a hearing, and respects M.R.'s rights, interests and wishes without violating Janice's constitutional rights. There is no basis for this Court to review it.

STATEMENT OF THE CASE

The Statement of the Case in the Petition contains numerous errors and inaccuracies, which are explained and corrected in Debra's opposition to the Petition. For the sake of brevity, and to avoid repetition, those corrections and clarifications are incorporated by reference herein.

M.R. is the minor child of Janice and Debra, who entered into a civil union in Vermont on November 6, 2003. M.R. was born on December 8, 2003. R. 206, 730.[1] Janice and Debra gave M.R. Debra's last name as his middle name. R. 253-54.

The record before the New York Court of Appeals is replete with documents that show Debra, Janice and M.R. as a family unit. Friends, neighbors and colleagues flooded the proud couple with notes and cards congratulating them on the birth of their son, and identifying both Janice and Debra as M.R.'s "mommies." R. 229-35; 238. Their synagogue publicly congratulated Janice and Debra "on the birth of their son" in a 2004 congregation newsletter. R. 255. Both Petitioner and Debra were later identified as parents on documents they completed in connection with their son's baby naming ceremony. The resulting "Child Naming Certificate" lists both Debra and Janice as M.R.'s parents. R. 253-54.

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[1] "R." refers to pages in the Record before the New York Court of Appeals.

Janice herself acknowledged Debra's parentage in various documents in the record. For example, on special occasions, Janice sent Debra e-mail messages and gave her greeting cards that Janice had written on M.R.'s behalf, addressing Debra as "mommy." R. 236, 239-50.

In raising M.R., Janice and Debra functioned as any parents would. Pages and pages of photographs in the record plainly show Debra and M.R., as parent and child, throughout his childhood. R. 223-26; 257-70; 277-92; 394-413; 416-27; 439-60; 550-52; 826-34; 837-44; 847-58. To protect M.R. should anything happen to her, on February 20, 2006 Janice signed a Power of Attorney appointing Debra as M.R.'s temporary guardian. R. 414-15.

Unfortunately, like so many couples with children, Janice and Debra's relationship deteriorated. In February 2006, Janice moved to a nearby apartment with M.R. Debra and Janice continued to raise M.R. together despite their separation, with Debra making regular visits and maintaining regular contact with M.R. by telephone. However, Janice abruptly terminated all contact between M.R. and Debra on April 29, 2008.

Debra immediately turned to the courts to reinstate her regular contact with M.R., and on May 21, 2008, commenced this action by Order to Show Cause, seeking joint custody and restoration of visitation. That court held on October 2, 2008 that Debra had alleged facts sufficient, if true, to establish a *prima facie* case to estop Janice from denying that she is M.R.'s second parent, and ordered that a hearing take place to determine

whether Debra stood in *loco parentis* to M.R. and, if she did, to determine whether custodial and visitation rights should be ordered in M.R.'s best interests. *See* Petition ("Pet.") at 53a-75a. The court also ordered that an Attorney for the Child be appointed to represent M.R.'s interests. Pet. at 75a. The trial court appointed Mr. Parisi to be the Attorney for the Child on October 22, 2008.

On April 9, 2009, the Appellate Division reversed the motion court and dismissed Debra's petition. Debra and the Attorney for the Child each moved to appeal the Appellate Division decision, and the New York Court of Appeals granted the motions for leave to appeal on September 1, 2009. The New York Court of Appeals, on May 4, 2010, applied New York comity principles to hold that Debra is M.R.'s parent due to the couple's Vermont civil union, and directed that a hearing should be held to determine whether granting Debra custody and/or visitation would serve M.R.'s best interests. *See* Pet. at 1a-49a. Janice then sought a rehearing in the New York Court of Appeals, and her motion was denied on July 1, 2010. Pet. at 76a.

Court-ordered visitation is continuing during the still-pending proceedings, and after the matter was remanded to the trial court, Janice began accepting support payments from Debra on M.R.'s behalf. M.R. has, therefore, had continuous access to Debra, and love and support from her, for his entire life. He will be seven years old on December 8, 2010.

REASONS FOR DENYING THE PETITION

Consistent with his mandate, the Attorney for the Child has advocated at each stage of this litigation in favor of M.R.'s rights, best interests and wishes, which may at times be separate and distinct from those of his parents. *See Troxel v. Granville*, 530 U.S. 57, 64-65 (2000) (plurality) (quoting Stevens, J., dissenting) (children are not "'so much chattel'"); *id.* at 86 (Stevens, J., dissenting) ("There is at a minimum a third individual, whose interests are implicated"). In asserting M.R.'s independent interest in maintaining his relationship with his second parent, the Attorney for the Child opposed Petitioner in the state court appellate proceedings.

Petitioner ignores M.R.'s separate, distinct rights and instead conflates them with her own, claiming that the New York Court of Appeals' decision violated "Petitioner's and M.R.'s fundamental rights." *See* Pet. at 19. In contending that M.R.'s interests are identical to hers, Petitioner brushes aside M.R.'s considerable interest in protecting his right to a relationship with and support from his second parent, and asks this Court to do the same. The New York Court of Appeals' decision, far from violating M.R.'s fundamental rights, protects and vindicates those rights.

M.R.'s right to continue his relationship with Debra derives from the due process and equal protection clauses in both the United States and New York constitutions. *See* U.S. Const. amend. XIV, § 1; N.Y. Const. art. I, §§ 6, 11; *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976)

("Minors, as well as adults, are protected by the Constitution and possess constitutional rights").

The Attorney for the Child consistently advocated, based upon Debra's strong showing that she was M.R.'s parent under various legal theories, that a hearing should be held to determine whether joint custody and/or continued visitation with Debra would be in M.R.'s best interests. *See, e.g.*, Brief for Appellant Attorney for the Child, *filed in* the New York Court of Appeals (No. 106569/08, Nov. 6, 2009). The New York Court of Appeals' decision holding that Debra is M.R.'s parent due to the couple's Vermont civil union protects M.R.'s constitutional rights and serves his interests; it does not prejudice him in any way. Instead, it provides the relief that the Attorney for the Child has sought all along: a best-interest hearing. *See* Pet. at 27a. While a forensic evaluation is currently underway, that hearing has not yet been scheduled.

M.R. will benefit from the New York Court of Appeals' decision regardless of the ultimate outcome of the best-interest hearing. If the trial court determines that custody and/or continued visitation with Debra is in M.R.'s best interests, then M.R. will benefit from, among other things, the continuing love and care of both parents who raised him from birth. In any event, M.R. will benefit from the determination that Debra is his legal parent in myriad other ways, such as the continuation of court-ordered financial support, and he will stand to inherit from Debra as well.

The New York Court of Appeals' decision therefore protects M.R.'s constitutional rights and is

consistent with his best interests and wishes. Moreover, this case is inappropriate for this Court's review due to Janice's failure to preserve her newly-invented choice of law issue, the fact that it was decided entirely on state-law grounds and the *sui generis* nature of its facts. *See generally* Debra H.'s Brief in Opposition to the Petition. The Petition should therefore be denied.

CONCLUSION

For the foregoing reasons, Respondent Attorney for the Child respectfully requests that the Court deny the Petition.

Respectfully submitted,

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